IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE C.N.RAMACHANDRAN NAIR

WEDNESDAY, THE 20TH DECEMBER 2006 / 29TH AGRAHAYANA 1928

OP.No. 17999 of 2001(P)

PETITIONER:

SRI.A.I.KURIAN,
FORBES EWARTS & FIGGIES(P) LTD.,
W.ISLAND, COCHIN-3.

BY ADV. SRI.P.BALAKRISHNAN (E)
SRI.R.AMRITHARAJ

RESPONDENTS:
---

1. THE COMMISSIONER OF INCOME TAX,
COCHIN.

2. THE DEPUTY COMMISISONER OF INCOME TAX,
CIRCLE I, DIVISION III, ERNAKULAM.

BY SRI.P.K.R.MENON(SR.),SC FOR IT
SRI.GEORGE K. GEORGE, SC

THIS ORIGINAL PETITION HAVING BEEN FINALLY HEARD ON 20/12/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

PETITIONER'S EXHIBITS:

P1: TRUE COPY OF THE INCOME COMPUTATION SHEET FOR THE ASSESSMENT YEAR 1995-96.

P2: .DO. 1996-97.

P3: TRUE COPY OF THE INTIMATION DT.20.10.97 ISSUED U/S.143(1)(a) BY THE ASSESSING AUTHORITY FOR THE ASSESSMENT YEAR 1995-96.

P4: .DO. 1996-97.

P5: TRUE COPY OF THE REVISION PETITION DT.21.2.2000 FOR THE ASSESSMENT YEAR 1995-96 FROM THE PETITIONER ADDRESSED TO R1.

P6: .DO. 1996-97 .DO.

P7: TRUE COPY OF THE ORDER DT.9.3.2001 OF R1 DISMISSING EXTS.P6&P7.

TRUE COPY

P.S. TO JUDGE

C.N.RAMACHANDRAN NAIR, J.

.....

O.P. No.17999 of 2001

.....

Dated this the 20th day of December, 2006.

JUDGMENT

The petitioner is challenging revisional orders of the Commissioner of Income Tax issued for the assessment years 1995-96 and 1996-97 sustaining disallowance of petitioner's claim for deduction of salary paid to driver and depreciation in respect of car made by the Assessing Officer in the course of proceedings issued under Section 143(1)(a) of the Income Tax Act (hereinafter called "the Act"). The petitioner-assessee returned income under the head "Income from salary, income from house property, capital gains and also income from other sources" for both the assessment years. It is seen in the statements accompanying the returns that the assessee claimed deduction of salary paid to driver amounting to Rs.32,000/- and Rs.20,000/- towards depreciation for the car for both the years in the computation of income under the head "Income from other sources". The Assessing Officer accepted the return in all other respects except in regard to claim of deduction towards driver's salary and depreciation in respect of car made by the petitioner under the head "Income from other sources". These amounts are added back, income determined and tax demanded through proceedings issued under Section 143(1)(a) of the Act. The assessee challenged these orders in revision petitions filed before the Commissioner under Section 264 of the Act on the

ground that the deductions claimed are not items prima facie inadmissible for addition under clause (iii) of first proviso to Section 143(1)(a) of the Act. However, the Commissioner vide Ext.P7 rejected the revision petitions on the ground that claim of salary paid to driver is inadmissible by virtue of law settled by decision of the Supreme Court in VIJAYA LAXMI SUGAR MILLS LTD. V. COMMISSIONER OF INCOME TAX (191 ITR 641) and so far as allowance of depreciation is considered, the claim is prima facie inadmissible because petitioner returned no income from hire charges against which only allowance of depreciation is provided while computing income under the head income from other sources under Section 57(ii) of the Act. It is against this common order that petitioner has filed this writ petition.

2. I heard counsel for the petitioner and Senior counsel Sri.P.K.R.Menon, appearing for the respondents. Counsel for the petitioner contended that the claim of deduction of depreciation and driver's salary are not items which could be disallowed as prima facie inadmissible while issuing proceedings under Section 143(1)(a) of the Act. According to him, the claim is obviously made under Section 57(iii) of the Act which is a residuary clause providing for deductions in the computation of income from other sources and the nature of the claim and the section under which it is claimed are such that, the issue cannot be settled without

an objective consideration or in other words, the issue calls for an adjudication as to whether petitioner will ultimately succeed or not. So much so, his contention is that the issues were such that disallowance could be done only in a proceedings under Section 143(3) and after issuing notice and giving opportunity to the petitioner under Section 143(2) of the Act. Senior counsel for respondents on the other hand contended that the nature of the claim is clear from petitioner's own statement and so long as the claim is not allowable either based on law declared by the Supreme Court or based on express provision of the statute, there is no need for any adjudication and the officer could disallow the claim as prima facie inadmissible under clause (iii) of first proviso to Section 143(1)(a) of the Act. According to him, by virtue of decision of the Supreme Court relied on by the Commissioner of Income Tax, salary paid to driver is a claim inadmissible under the head of income under which petitioner's income falls. Similarly, depreciation is allowable under Section 57(ii) of the Act which can be granted only against income from hire charges. So long as petitioner has not returned any income from hire charges, petitioner is not entitled to any deduction under Section 57(ii) and so much so, the claim was rightly declined as prima facie inadmissible is his argument.

3. Section 143(1)(a) of the Act mandates that on processing the return by

following the procedure prescribed therein, if it is found that any tax or other amount is due from the assessee or any refund is due to the assessee, an intimation has to be sent to the assessee. Apart from correction of arithmetical errors in the returns, accounts or documents accompanying the same, the Assessing Officer in the course of processing of the returns is authorised under clause (iii) of first proviso to Section 143(1)(a) to grant prima facie admissible deductions and allowances or set off of carry forward loss claimed by the assessee. The question to be considered is whether disallowance of the two items of claims of deduction made by the assessee were prima facie inadmissible to justify disallowance by the officer in exercise of authority vested in him under clause (iii) of first proviso to Section 143(1)(a)of the Act. The Act is silent as to which are the items of allowances and deductions that could be disallowed as prima facie inadmissible. However, the Circular No.689 dated 24.8.1994 issued by the Central Board of Direct Taxes among other things states that claims which are patently inadmissible in law could be disallowed under clause (iii) of first proviso to Section 143(1)(a). Return is always accompanied by a statement of computation of income and tax liability which would certainly show the head of income under which income is computed claiming deductions and allowances. The Assessing Officer should therefore consider prima facie admissibility of claim with reference to the relevant

provisions applicable to the head of income under which income is declared. If the statute expressly prohibits the allowance or deduction claimed, then the claim is patently inadmissible in law and so much so, it is within the powers of the officer to disallow the claim under the clause abovereferred. On the other hand if the claim of deduction or allowance is maintainable under any provision of the Act, the disallowance whether in full or in part, calls for adjudication and in that event, the officer cannot disallow the claim as one prima facie inadmissible. In this view of the matter, I find the disallowance of depreciation claimed by the petitioner on car against income from other sources is rightly rejected as a claim prima facie inadmissible by the assessing officer which is confirmed by the Commissioner in revision because the only provision under which depreciation could be allowed against income from other sources is Section 57(ii) which can be granted only against income on hire charges received for machinery, plant or furniture etc., falling under Section 56(2)(iii) of the Act. It is clear from the statement accompanying the return filed by the petitioner that the only two items of income returned by the petitioner under the head "income from other sources" are interest income and dividends and no hire charges falling under Section 56(2)(iii) of the act is accounted by the petitioner. Even though counsel for the petitioner submitted that the claim of depreciation can come under Section 57(iii) of the Act,

I am unable to accept this contention because the said provision provides for deduction of "any other expenditure(not being in the nature of capital expenditure) laid out or expended wholly and exclusively for the purpose of making or earning such income". Depreciation is not an expenditure, but an allowance which is separately provided under Section 32 of the Act, allowable in the computation of income from business or profession. In fact, depreciation is generally allowed only under Section 32 i.e. in the computation of income from business and profession and Section 57(ii) providing for depreciation is only an exception to the said provision which is allowed only in the computation of income received on hire of machinery, plant, furniture etc., under the head "income from other sources". In other words, Section 57(iii) does not visualise granting of any allowance like depreciation but provides for expenditure other than capital expenditure laid out or expended for the purpose of earning income of the nature falling under Section 56. Therefore, the disallowance of depreciation on car claimed against income from other sources as prima facie inadmissible is perfectly justified and I uphold the impugned order on this issue.

4. The next item disallowed as prima facie inadmissible is the driver's salary claimed by the petitioner against income from other sources. Even though petitioner has declared two items of income under this head namely "dividend

income" and "interest income", petitioner still claimed driver's salary as a deduction. Counsel for the petitioner submitted that petitioner has income in the nature of interest from a company at Coonoor and probably petitioner was going there in his car to collect the income which obviously means expenditure. If that be so, then it is strange to note that petitioner has not claimed any deduction towards fuel charges or for maintenance of car because if driver salary is allowable for earning interest income under Section 57(iii), then I see no reason why fuel charges and maintenance cost of the car should not be allowed. Counsel for the petitioner explained that this could be an omission. On going through the Commissioner's order in revision, I find the petitioner has not stated any explanation or reasons to substantiate or to link the expenditure with the earning of income. An order under Section 143(1)(a) is issued on subjective satisfaction of the officer. However, a revision against the same is at the instance of the assessee and unless the assesseee establishes the case with facts, the assessee cannot take the stand that the claim is not prima facie inadmissible. Even though Section 143 (1)(a)(ii) expressly provides for granting of certain allowances and deductions, when the assessee is claiming it in the return, it is clear from the negative provision contained in clause (iii) of first proviso to Section 143(1)(a) that in order to accept the income returned, the assessing officer should be satisfied that the allowances

and deductions claimed by the assessee in the return are prima facie admissible which as I already stated should be considered with reference to the statutory provision under which assessee makes the claim and if no express provision is stated by the assessee, the officer should consider the claim under the provision under which the claim will generally fall. Even though the assessee in this case has not expressly stated the provision under which the deduction is claimed, the officer was bound to consider the claim under Section 57 and the only sub-section under which the claim can be considered is clause (iii) of Section 57 which is the residuary provision providing for all items of expenditure not mentioned elsewhere in the Section. I feel any item of expenditure claimed under clause (iii) of Section 57 calls for adjudication because the assessee claiming it should have an opportunity to demonstrate that the expenditure was incurred for the purpose of earning income of the nature referred to therein. Therefore, generally items of expenditure falling under the residuary entry Section 57(iii) of the Act or for that matter, even Section 37(1) of the Act should not be disallowed as prima facie inadmissible unless the claim is expressly barred by any statutory provision. Even though the Commissioner of Income Tax has relied on the decision of the Supreme Court in VIJAYA LAXMI SUGAR MILLS LTD. V. COMMISSIONER OF INCOME TAX (191 ITR 641) and the Senior counsel for the Income Tax

Department also contended that the issue whether salary paid to employees is an inadmissible deduction under Section 57(iii) stands settled by the said decision of the Supreme Court, on going through the said judgment I do not find that the Supreme Court has held a general proposition that salary paid to an employee cannot under any circumstance be allowed under Section 57(iii) of the Act. All what the Supreme Court has held is that no employee is required for the Official Liquidator to earn salary on short term deposits maintained in a Bank because income is earned irrespective of whether the Official Liquidator maintains staff or pays salary to them. In fact there can be cases where the interest earned on deposits in private firms, the volume and number of deposits, the places where deposits are maintained in relation to the location of the assessee, the pattern of collection may need the service of an employee. Of course if any question of law is settled by decision of the Supreme Court, then by virtue of Article 141 of the Constitution of India no one can entertain any doubt about it and a claim of allowance found inadmissible by the Supreme Court can be disallwed in exercise of authority under clause (iii) of first proviso to Section 143(1)(a) of the Act. However, since the decision of the Supreme Court abovereferred is applicable to the facts of that case only, it cannot be said that the salary paid to an employee is to be disallowed as a prima facie inadmissible claim under clause (iii) of first

proviso to Section 143(1)(a) of the Act. However, in this case strangely even after pursuing the matter in revision under Section 263 of the Act before the Commissioner, the petitioner has not even furnished details much less substantiated the claim. This is a case where the Assessing Officer found the claim of deduction of salary paid to the driver in the computation of income under the head "income from other sources" rightly or wrongly, prima facie inadmissible. The petitioner aggrieved by the order rightly took the matter in revision before the Commissioner. In order to get the relief, the petitioner will have to demonstrate before the Commissioner with details that the claim is maintainable under Section 57(iii) of the Act which is the claim of the petitioner and only if the assessee establishes that the claim is tenable and it calls for adjudication, the assessee can take the stand that the claim is not prima facie inadmissible. In other words, in order to establish that the claim is not prima facie inadmissible under clause (iii) of first proviso to Section 143(1)(a) of the Act, the assessee has to with details establish before the revisional authority that the claim is prima facie admissible which unfortunately in this case the assessee has not established. In the circumstances, the revisional order of the Commissioner has to be only upheld and I do so. However, I make it clear this position should not be understood as laying down the proposition that expenditure of the nature claimed by the assessee under

Section 57(iii) i.e. salary paid to driver, is a prima facie inadmissible claim in all cases and under all circumstances. The O.P. is dismissed with the above observation.

C.N.RAMACHANDRAN NAIR
Judge

pms